UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
TACOMA DIVISION

JOHN DOE #1, an individual, JOHN DOE #2, an individual, and PROTECT MARRIAGE WASHINGTON, Plaintiffs, vs. SAM REED, in his official capacity as Secretary of State of Washington, BRENDA GALARZA, in her official capacity as Public Records Officer for the Secretary of State of Washington, Defendants.	No. 3:09-CV-05456-BHS **PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO JOIN ADDITIONAL PARTIES AND MEMORANDUM IN SUPPORT THEREOF** NOTE ON MOTION CALENDAR: August 21, 2009 The Honorable Benjamin H. Settle

INTRODUCTION

On August 6, 2009, Defendants filed their Motion and Memorandum to Join Additional Parties ("Motion to Join"). For the reasons set forth in this Opposition to Defendants' Motion to Join Additional Parties and Memorandum in Support Thereof ("Joinder Opposition"), Plaintiffs object to Defendants' Motion to Join.[1]

[1]For purposes of this Joinder Opposition, Plaintiffs shall accept that the facts presented by the State as to those who have filed requests for public records as true. Those requesting the records shall be referred to jointly as the "Suggested Parties."

ARGUMENT

I. Legal Standard: The Two-Prong Joinder Test

Mandatory joinder in the federal courts is governed by Federal Rule of Civil Procedure 19(a)(1) ("Rule 19"), which states:

> A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:
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> (A) in that person's absence, the court cannot accord complete relief among existing parties; or
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> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
>
> (i) as a practical matter impair or impede the person's ability to protect the interest; or
>
> (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Under Rule 19(a)(1), joinder is necessary if either subsection (A) or (B) is satisfied. The Ninth Circuit has stated that: "This court undertakes a two-pronged analysis to determine whether a non-party is necessary under Rule 19(a). If a non-party satisfies either of the two prongs, the non-party is necessary. First, we determine whether 'complete relief' is possible among those already parties to the suit. . . .Second, we decide whether the non-party has a legally protected interest in the suit." *Yellowstone County v. Pease*, 96 F.3d 1169, (9th Cir. 1996) (emphasis, footnote and citations omitted); *see also Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990). The joinder inquiry "should focus on the practical effects of joinder and nonjoinder." *Eldredge v. Carpenters 46 Northern California Counties Joint Apprenticeship and Training Committee*, 662 F.2d 534, 537 (9th Cir. 1981); *see also Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 116 n.12 (1968) (the decision as to whether a party is necessary "must be made on the basis of practical considerations").

The first inquiry under Rule 19 requires a court to "decide if *complete relief* is possible among those already parties to the suit. This analysis is independent of the question whether relief is available to the absent party." *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990) (emphasis in original). Further, "[t]his portion of the rule is concerned only with 'relief as

between the persons already parties, not as between a party and the absent person whose joinder is sought.'" *Eldredge*, 662 F.2d at 537 (quoting 3A Moore's Federal Practice P 12.07-1(1), at 19-128 (2d ed. 1980)). Finally, "[t]he relevant question for Rule 19(a) must be whether success in the litigation can afford the plaintiffs the relief for which they have prayed." *Confederated Tribes of the Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1501 (9th Cir. 1991) (O'Scannlain, J., concurring in part and dissenting in part).

The second inquiry "required by rule 19(a) concerns prejudice, either to the absent persons or to those already parties." *Eldredge*, 662 F.2d at 538. This second inquiry is primarily concerned with whether a potential party has a "legally protected interest" in the litigation. Although the courts "have developed few categorical rules informing this inquiry," one such rule is that "an absent party has no legally protected interest at stake in a suit merely to enforce compliance with administrative procedures." *Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. California*, 547 F.3d 962, 970-71 (9th Cir. 2008).[2]

However, the fact that a third party may have some legally protected interest does not end the inquiry under Rule 19(a)(1)(B). Instead, the court must further determine whether "the disposition of the action may 'as a practical matter impair or impede his ability to protect that interest.'" *Eldredge*, 662 F.2d at 538. "Impairment may be minimized if the absent party is adequately represented in the suit." *Makah*, 910 F.2d at 558. If the third party's rights are not impaired, then the "court must also determine whether *risk of inconsistent rulings* will affect the parties present in the suit." *Id*. (emphasis in original).

II. The Suggested Parties Are Not Necessary Under the Rule 19 Test.

Under Rule 19, the Suggested Parties are not necessary parties and should not be joined. The Suggested Parties are not necessary to afford complete relief to the parties already present before the court, and the Suggested Parties lack a legally protected interest in this action. Furthermore,

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[2]This categorical rule is based on the Ninth Circuit's decision in *Northern Alaska Environmental Center v. Hodel*, 803 F.2d 466 (9th Cir. 1986) ("*NAEC*"). In *NAEC,* the Defendants attempted to join a group of miners whose interest in the litigation was limited to how stringent a particular set of rules under which they would be required to operate would be. *Id*. The rules were of interest to any miner with pending mining plans, but the Court prevented miners with pending plans from being joined: "Naturally, all miners are 'interested' in how stringent the requirements will be. But miners with pending plans have no legal entitlement to any given set of procedures." *Id*.

even if the Suggested Parties had a legally protected interest in this action, that interest will not be impaired or impeded by failing to join them in this action, and Defendants will not be subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of that interest. Moreover, allowing joinder in this case will lead to absurd results that could prevent Plaintiffs and other future parties from ever effectively litigating questions related to public records requests under the Washington Public Records Act. Therefore, joinder should be denied.

A. The Court may grant complete relief among the parties without the joinder of additional parties.

Complete relief can be afforded without the joinder of the Suggested Parties. Plaintiffs have alleged that the Washington Public Records Act is unconstitutional under the First and Fourteenth Amendments to the United States Constitution. Plaintiffs have asked the Court to declare the Public Records Act unconstitutional as applied to referendum petitions, or in the alternative, as applied to Referendum 71 because there is a reasonable probability of threats, harassment, and reprisals. Accordingly, Plaintiffs have also asked the Court to enjoin Defendants Reed and Galarza from complying with any request under the Public Records Act. Because Plaintiffs challenge the constitutionality of the statute, Defendants Reed and Galarza, who are represented by the Attorney General for the State of Washington, are the correct parties to defend the constitutionality of the state statute. Plaintiffs can obtain complete relief without the joinder of any additional parties. The mere fact that the Suggested Parties may have an interest in the outcome of this litigation is irrelevant for purposes of the first inquiry under Rule 19. Accordingly, because the parties can obtain complete relief without the joinder of additional parties, joinder is improper under Rule 19(a)(1)(A).

B. The Suggested Parties do not have a legally protected interest in this litigation, and therefore joinder is improper.

Joinder is also improper under Rule 19(a)(1)(B), which requires the additional party to have a "legally protected interest" in the proceedings before the party can be joined. One of the few categorical rules about who has a "legally protected interest" in the outcome of litigation is that a potential party does not have a legally protected interest in a suit to enforce compliance with

administrative procedures. *Cachil Dehe Band*, 547 F.3d at 970-71. The interest of the Suggested Parties is exactly the sort of interest in compliance with administrative procedures that precludes joinder. As Defendants state in their Motion to Join, "[t]he three requestors assert a right to inspect and to copy the petitions filed in support of RM-71." (Motion to Join at 4.) Defendants seek to compel the joinder of the Suggested Parties merely to allow the Suggested Parties to assert their interests in compliance with the administrative procedures of the Washington Public Records Act. Such an interest is insufficient to compel joinder under Rule 19(a)(1)(B).[3]

If the Suggested Parties are not necessary for Plaintiffs' complete relief, and they do not have a legally protected interest, the Court's inquiry ends here. The Suggested Parties are not proper parties for mandatory joinder, and should not be joined. As set forth above, this is the case here, and the Suggested Parties should not be joined.

C. Preventing joinder would not impair or impede the rights of the Suggested Parties and would not expose Defendants to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations, and the Suggested Parties should not be joined.

Because the Suggested Parties are not necessary for complete relief and do not have a legally protected interest in this litigation, it is unnecessary for the Court to engage in an analysis of the second part of Rule 19(a)(1)(B). However, even if this Court were to find that the Suggested Parties are have a legally protected interest in this litigation, because the Suggested Parties do not satisfy the subparts of Rule 19(a)(1)(B), they cannot be joined. The Suggested Parties lack an interest that, as a practical matter, will be impaired or impeded if they are not joined as parties to

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[3]The wisdom of preventing joinder for mere enforcement of administrative procedures is well-illustrated by this case. If Plaintiffs prevail on either of their Constitutional claims, there would be no question that the Suggested Parties never had a legally protected interest that they could assert here. If Plaintiffs fail on both of their Constitutional claims, Plaintiffs are not the party with whom the Suggested Parties would have an issue—their issue would be with the State, and even then, that issue would only arise if the State failed to release the documents at issue.

Indeed, the end result of this argument is circular and brings us back to the first part of Rule 19. Even if the Suggested Parties could be joined because they have an "interest" in obtaining the lists of petition signers, Plaintiffs do not raise any claim that could be properly brought against the Suggested Parties. The Suggested Parties are not responsible for the Constitutionality of the Washington Public Records Act, nor are they enforcing agents of the Public Records Act. If Plaintiffs were to attempt to bring the Suggested Parties into the suit on their own, separate from the Motion to Join, the Suggested Parties would have cause to file for sanctions against Plaintiffs for bringing a frivolous lawsuit against them.

this suit. Furthermore, Defendants will not be exposed to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations if the Suggested Parties are not joined.

1. The failure to join the suggested parties will not, as a practical matter, impair or impede their ability to protect their suggested interest.

Defendants do not attempt to explain how the Suggested Parties' rights will be impaired or impeded if they are not joined to this suit. Indeed, given that the Suggested Parties' rights arise only if this Court finds that the statute is constitutional, it is hard to imagine how Defendants would present such an argument. Plaintiffs have alleged only that the Public Records Act is unconstitutional under the First and Fourteenth Amendment to the United States Constitution as applied to referendum petitions, or in the alternative, to Referendum 71 because there is a reasonable probability of threats, harassment, or reprisals. Defendants do not suggest how the Suggested Parties could have an interest in the resolution of this question, and therefore joinder is inappropriate.

2. The failure to joint the parties will not expose Defendants to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations.

Defendants' Motion to Join focuses almost entirely on the second sub-part of Rule 19(a)(1)(B). However, contrary to Defendants' assertions, there is no substantial risk that they will be exposed to double, multiple, or otherwise inconsistent obligations if the Suggested Parties are not joined. Article VI of the United States Constitution states that:

> This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2 ("Supremacy Clause"). Given the Supremacy Clause, the Court is required to address Plaintiffs' claims under the First and Fourteenth Amendments to the United States Constitution. If the Court rules that the Public Records Act is unconstitutional, the Suggested Parties will have no statutory state right to the disclosure of the referendum petitions.

Furthermore, while principles of comity generally prevent a federal court from enjoining a state court, the Anti-Injunction Act, 28 U.S.C. § 2283, contains an exception that allows a federal court to issue an injunction to stay proceedings in a state court in order to protect or effectuate its

judgments (often referred to as the "relitigation exception").[4] Temporary restraining orders and preliminary injunctions are "judgments" within the meaning of the relitigation exception, and a federal court may issue an injunction to stay state court proceedings to protect those judgments until the "district court reaches the case's merits."[5] *Nat'l. Basketball Ass'n. v. Minn. Prof'l. Basketball Ltd. P'ship.*, 56 F.3d 866, 871-72 (8th Cir. 1995) (granting an injunction to stay state court proceedings and preventing the parties from participating in the state proceedings). Here, the remedy is not mandatory joinder pursuant to Rule 19 to prevent this possibility, but an injunction from this Court, pursuant to the relitigation exception, if and only if a state court attempts to consider any claims regarding the Constitutionality of Referendum 71 pursuant to the Public Records Act prior to this Court considering the merits of Plaintiffs' claims.[6]

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[4] "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283.

[5] Defendants assertions that they will be subjected to inconsistent obligations are remarkably similar to those before the court in *NBA v. MPBLP*. In that case, the NBA obtained a temporary restraining order preventing the sale of a team from proceeding. 56 F.3d at 869. Shortly thereafter, the buyer filed an action in state court seeking damages and specific performance of the contract. *Id.* The state court then entered its own temporary restraining order preventing the NBA from finalizing the 1994-1995 NBA season schedule. The federal court responded by enjoining the state court action. The state court disobeyed the order in reliance upon the Anti-Injunction Act, prompting a second order from the federal court that included stiff contempt sanctions for disobedience, resulting in the appeal.

[6]Defendants point to a group of cases involving a request under the federal Freedom of Information Act, to illustrate what they view as an instance where a court found that joinder, though unnecessary to its ruling, would have been appropriate in a case similar to this. *See GTE Sylvania, Inc. v. Consumer Product Safety Commission*, 598 F.2d 790 (3rd Cir. 1979) ("*Third Circuit Decision*"); *GTE Sylvania, Inc. v. Consumers Union of the United States*, 445 U.S. 375 (1980) ("*D.C. Circuit Appeal*"); Motion to Join at 5-6). Unfortunately, Defendants' citation to a Third Circuit case and a tangentially-related Supreme Court case make light of a complicated set of related lawsuits that were reviewed by the Supreme Court on three occasions and do not help Defendants' position that joinder is proper here. *See Consumer Product Safety Commission v. GTE Sylvania*, 447 U.S. 102 (1980) ("*Third Circuit Appeal*") (*aff'g 3rd Circuit Appeal*); *Consumers Union of the United States, Inc. v. Consumer Product Safety Commission*, 590 F.2d 1209 (D.C. Cir. 1978) ("*D.C. Circuit Decision*") (*overruled by D.C. Circuit Appeal*); *see also GTE Sylvania, Inc. v. Consumers Union of the United States*, 434 U.S. 1030 (1978) (U.S. Supreme Court case in D.C. Circuit litigation deciding other issues).

Immediately obvious upon looking at the entire set of related cases is that, contrary to the implication of Defendants, the Supreme Court considered the appeals of the related cases separately, and the issues were not resolved "only with *a* decision of the U.S. Supreme Court." (Motion to Join at 6 (emphasis added).) In fact, the Supreme Court considered the Third Circuit and the D.C. Circuit cases separately, and issued entirely separate opinions on both appeals, because both appeals dealt with separate issues. *Compare Third Circuit Appeal with D.C. Circuit Appeal*. In neither appeal did the Supreme Court address the issue of joinder. *Id*.

Important to this Court, though the *Third Circuit Decision* dealt with the propriety of joinder of parties in the particular circumstances of that case, it does not support a finding that joinder is proper here. *Third Circuit Decision*

III. Joinder of the Suggested Parties Would Lead to Absurd Results

It is illustrative to consider the absurd results that would result if Defendants' Motion to Join is granted. Each and every time a new person requested the names of the petition signers during the pendency of this action, Defendants would need to inform Plaintiffs of the request. Next, Plaintiffs would need to obtain the information necessary to serve this person deemed necessary to the litigation.[7] After this, Plaintiffs would be required to serve this new person, with the expense and potential difficulty that could entail, including potential delay to the litigation. Moreover, because of the nature of the Washington Public Records Act, this procedure could be repeated dozens, if not hundreds or even thousands of times, as each new person requested the information on the petition signers.[8] To require joinder of the Suggested Parties (and a large number of potential parties) would cut against the practicality that the Ninth Circuit and the Supreme Court have found to be the focus of Rule 19 joinder.[9] See *Eldredge*, 662 F.2d at 537;

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at 790; Motion to Join at 6. Tellingly, the Third Circuit never addressed the issue of whether the groups who requested information under FOIA (and who appeared as *amici* in the Third Circuit, but not as parties) could have been properly joined at the lower court level. *Id*. at 798. The Third Circuit "assume[d]" for purposes of the decision that the *amici* should have properly been joined under Rule 19, and never engaged in an analysis of whether they could have been properly joined. *Id*. Moreover, the Third Circuit, quoted by Defendants without noting that the Third Circuit did not engage in the Rule 19 analysis, expressly *refused* to adopt any rule about whether those requesting documents should be joined in suits related to those requests, and only recognized the importance of considering joinder under an appropriate Rule 19 analysis. *Id*. Indeed, the *Third Circuit Decision* supports the importance of engaging in the Rule 19 analysis outlined by Plaintiffs, and ignored by Defendants' Motion to Join. *Id*.

[7]This particular step of the process might not be as simple as it seems. For example, one of the requests attached to the Joinder Motion does not contain anything more than a name, an email address, and a phone number for one of the Suggested Parties. (Joinder Motion, Exhibit A.) Presumably, to get service on this requestor, Plaintiffs would have to do their own investigation into this requestor's specific whereabouts before even attempting service, with all the potential time delays and costs such an investigation would entail.

[8]This situation could actually encourage people who oppose the Referendum to request the names of the petition signers, so as to make this litigation prohibitively costly and/or difficult for Plaintiffs to maintain. Alternatively, there could be circumstances where this tactic could be used by those who do not wish to have the information released to delay and prevent the release of information indefinitely.

[9]In *Eldredge*, the Ninth Circuit addressed the issue of those specific parties who, despite being non-necessary parties, might still have an interest in the litigation that they feel should have a chance to be heard. *Eldredge*, 662 F.2d at 538. The Ninth Circuit determined that such parties should not be joined under Rule 19; instead, the courts should allow such parties to intervene under Rule 24, and determine the merits of intervention on an intervenor-by-intervenor basis. *Id*. Preventing joinder, yet allowing for the possibility of intervention upholds the practicality requirements of Rule 19, prevents the absurd results that would occur if joinder of these parties was mandatory, and protects those potential parties who feel the need to be heard, without requiring joinder of parties who may not feel

Provident Tradesmens Bank & Trust, 390 U.S. at 116 n.12.

CONCLUSION

For the reasons set forth in this Joinder Opposition, Defendants' Joinder Motion should be denied.

Dated this 17th day of August, 2009.

Respectfully submitted,

/s/ Sarah E. Troupis

James Bopp, Jr. (Ind. Bar No. 2838-84)*
Sarah E. Troupis (Wis. Bar No. 1061515)*
Scott F. Bieniek (Ill. Bar No. 6295901)*
BOPP, COLESON & BOSTROM
1 South Sixth Street
Terre Haute, Indiana 47807-3510
(812) 232-2434
Counsel for All Plaintiffs

Stephen Pidgeon
ATTORNEY AT LAW, P.S.
30002 Colby Avenue, Suite 306
Everett, Washington 98201
(360) 805-6677
Counsel for All Plaintiffs

**Pro Hac Vice Application Granted*

their interest merits litigation.

CERTIFICATE OF SERVICE

I, Sarah E. Troupis, am over the age of 18 years and not a party to the above-captioned action. My business address is 1 South Sixth Street; Terre Haute, Indiana 47807-3510.

On August 17, 2009, I electronically filed the foregoing document described as Plaintiffs' Opposition to Defendants' Motion to Join Additional Parties and Memorandum in Support Thereof, with the Clerk of Court using the CM/ECF system which will send notification of such filing to:

James K. Pharris
jamesp@atg.wa.gov
Counsel for Defendants Sam Reed and Brenda Galarza

I declare under the penalty of perjury under the laws of the State of Indiana that the above is true and correct. Executed this 17th day of August, 2009.

/s/ Sarah E. Troupis
Sarah E. Troupis
Counsel for All Plaintiffs